California State

Legislative Bill Analysis

Board of Equalization

Legislative and Research Division

Assembly Bill 102 (Rodriguez)

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Program: Surface Transportation Hazardous Materials Fee

Sponsor: Author

Government Code Article 3.9 (Section 8574.30) and Section 8670.40

Effective: January 1, 2016

This analysis is limited to the provisions which impact the Board of Equalization (BOE).

Summary: Among its provisions, imposes an unspecified fee on owners of hazardous materials, as specified.

Purpose: To provide funding for regional and onsite response capabilities in the event of a large-scale hazardous materials release from a truck or train accident.

Fiscal Impact Summary: Unknown due to lack of fee rate.

Existing Law:

Health and Safety Code. Under existing law, the Health and Safety Code¹ imposes various hazardous waste fees on the generation, storage, treatment, and disposal of hazardous wastes. These fees are collected by either the BOE or the Department of Toxic Substances Control (DTSC). Revenues from the hazardous waste fees are used to fund DTSC's administration of the hazardous waste regulatory program and the state Superfund program.

Government Code. California law² imposes an oil spill prevention and administration fee upon crude oil or petroleum products received at a refinery or marine terminal by any mode of delivery that has passed over, across, under, or through waters of the state.

The Administrator, a Governor's appointee in the Department of Fish and Wildlife, annually sets the fee rate. The Administrator is required to prepare a plan that projects revenues and expenses over three fiscal years. The fee amount is set so that the projected revenue will meet current and proposed state budget needs. The Administrator may also allow for a surplus if revenues will not be adequate to meet contingencies and shortfalls.

Fees are deposited into the Oil Spill Prevention and Administration Fund to pay for oil spill prevention programs and studies.

Public Utilities Code. Existing law³ requires the California Public Utilities Commission (CPUC) to annually determine a fee to be paid by every common carrier and related business subject to the jurisdiction of CPUC, including, but not limited to, every railroad corporation.

The annual fee is established to produce a total amount equal to the amount established in the authorized CPUC budget for the same year, including adjustments appropriated by the Legislature and an appropriate reserve to regulate common carriers and related businesses, less the amount to be paid from special accounts or funds, reimbursements, federal funds, other revenues, and unencumbered funds from the preceding year.

For fiscal year 2013-14, the railroad corporation fees are fixed as follows:

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¹ Division 20, Chapters 6.5, 6.8, and 6.11 of the Health and Safety Code; Part 22 (commencing with Section 43001) of Division 2 of the Revenue and Taxation Code (RTC).

² Government Code (GC) Section 8670.40.

³ Public Utilities Code Section 421.

Class I: Burlington Northern Santa Fe \$1,640,721.00 Union Pacific \$4,019,439.00

Class II and III (shortline) 0.27% of gross revenue, minimum of \$500 each

The annual fee is collected by CPUC and transmitted at least quarterly to the Treasurer for deposit into the Public Utilities Commission Transportation Reimbursement Account in the General Fund.

The fees paid by railroad corporations are required to be used for state-funded railroad investigation and enforcement activities of the commission, other than the rail safety activities funded by the Transportation Planning and Development Account.

In addition, current law⁴ requires all rail operators to provide a risk assessment to the CPUC that describes all of the following:

- Rail facility location and functions.
- Movement and storage of cargo, including hazardous material cargo, at the rail facility, including the frequency of that movement or storage.
- Information regarding rail operator safety practices, training programs, and emergency response procedures at the rail facility.
- Rail operator communication procedures with state and local personnel that would be involved in responding to an act of terrorism, sabotage, or other crimes at the rail facility.

Current law⁵ also covers hazardous materials transported by rail, and requires each railroad corporation that transports hazardous materials in the state to provide:

- A system map of the state to the Office of Emergency Services (OES) and to CPUC, showing
 practical groupings of mileposts on the system and mileposts of stations, terminals, junction
 points, road crossings, and the locations of natural gas and liquid pipelines in railroad rights-ofway.
- Annually to the OES a copy of a publication which identifies emergency handling guidelines for the surface transportation of hazardous materials, unless otherwise provided.
- Specified information if there is a train incident resulting in a release or an overturned railcar or an impact which threatens a release of a hazardous material.

Proposed Law: This bill imposes an unspecified fee on the owner of hazardous material at the time that hazardous material is transported by rail or surface transportation in this state. The Director of the Governor's Office of Emergency Services (OES) shall establish a fee schedule based on each loaded rail car or truck. The Director may establish a separate fee schedule for hazardous materials transported by railroad and a separate fee schedule for hazardous materials transported by truck. Those fee schedules determine the amounts paid by each hazardous materials owner. Hazardous materials owners pay the fee to the railroads or the owner of the truck, and the railroad remits the collected fees to the BOE.⁶

The fee would be imposed within six months of the Director establishing the fee schedules, based on each loaded rail car or truck as follows:

• If the loaded rail car or truck enters the state from outside this state, the fee is imposed on the owner of the hazardous material at the time the loaded rail car or truck enters this state.

⁴ The Local Community Rail Security Act of 2006, Article 7.3 (commencing with Section 7665), of Chapter 1 of Division 4 of the Public Utilities Code.

⁵ Hazardous Materials Transportation by Rail, Article 7.5 (commencing with Section 7671), of Chapter 1 of Division 4 of the Public Utilities Code.

⁶ The return and fee amounts are remitted to the BOE by the person required to be registered with the BOE. In the current form, this bill only requires the railroads to register with the BOE. See Comment 2 for the need to register truck owners.

- If the rail car or truck is loaded within this state, the fee is imposed at the time of loading of the hazardous material into or onto the rail car or truck for transport in or through this state.
- Any hazardous material owner, railroad, or truck owner that has paid the fees shall not be assessed additional fees for transporting the same hazardous materials in the same rail cars on a different railroad within the state.

Revenues collected, less refunds and expense reimbursement to the BOE, would be deposited into the Regional Railroad and Surface Transportation Accident Preparedness and Immediate Response Fund (Fund), which this bill creates. The Fund will repay any moneys loaned to pay OES implementation costs. Upon appropriation by the Legislature, moneys in the Fund will be used to plan, develop, create, acquire, support, and maintain emergency response capabilities to prepare for, and respond to, rail car or truck accidents involving large-scale hazardous materials releases. Funds are also used for an OES biennial review to identify gaps in the ability to respond to hazardous materials spills.

Definitions. This bill defines the following terms:

- "Director" means the Director of Emergency Services.
- "Hazardous material" means a material that the United States (US) Department of Transportation (DOT) has designated as a hazardous material for purposes of transportation in Part 172 of Title 49 of the Code of Federal Regulations (CFR).
- "Owner" means the person who has the ultimate control over, and the right to use or sell, the hazardous material being shipped. There is a rebuttable presumption that the shipper, consignor, or consignee of the hazardous material is the owner of the hazardous material. This presumption may be overcome by showing that the ownership of the hazardous material rests with someone other than the shipper, consignor, or consignee. Evidence to rebut the presumption may include, but is not limited to, a bill of lading, shipping document, bill of sale, or other medium, that shows the ownership of the hazardous material rests in a person other than the shipper, consignor, or consignee.
- "Railroad" has the same meaning as defined in PUC Section 229.
- "Rail car" means a railroad car or rolling stock designed to transport hazardous material commodities, and includes those railroad cars subject to the requirements of Part 179 (commencing with Section 179.1) of Title 49 of the CFR, or a successor set of regulations adopted by the US DOT.

Railroads. Railroad operators that transport hazardous material by rail car shall register with the BOE and collect the fee from the owner of the hazardous material. Fees are paid to the BOE with the quarterly return. Any fees collected by the railroad from the hazardous material owner that have not been remitted to the BOE are considered a debt owed to the state by the railroad.

Truck owners. Truck owners that transport hazardous material by truck shall collect the fee from the hazardous material owner. Fees are paid to the BOE with the quarterly return. Any fees collected by the truck owner from the hazardous material owner that have not been remitted to the BOE are considered a debt owed to the state by the truck owner.

Hazardous material owner. The hazardous material owner is liable for the fee until it has been paid to the BOE, except that payment to a railroad or truck owner registered with the BOE for collection of the fee is sufficient to relieve the owner from further fee liability.

BOE administration. The BOE will assess and collect the fee in accordance with the Fee Collection Procedures Law (FCPL).⁷ The references in the FCPL to "fee" include the fee imposed by this bill, and the

⁷ Part 30 (commencing with Section 55001) of Division 2 of the RTC.

reference to "feepayer" includes the person required to pay the fee imposed by this bill.

The FCPL generally provides for the BOE's administration of fee programs. Among other things, the FCPL provides for collection, reporting, return, refund, and appeals procedures, as well as the BOE's authority to adopt regulations related to the FCPL's administration and enforcement.

Emergency regulation authority is also provided to the BOE.

Petition for redetermination and claim for refund. The BOE would handle and decide petitions for redetermination and claims for refund, except for those filed on the grounds that the contents of the rail car or truck is or is not a hazardous material. The BOE would forward such petitions or refund claims to the Director for a decision.

Returns. The railroads required to register with the BOE shall file quarterly returns, on or before the last day of the calendar month following the end of the calendar quarter. The railroad shall pay the fees to the BOE with the return, based on the number of loaded hazardous material rail cars transported within the state.

Contribution in kind and set off. OES may authorize fee payment through contributions in kind of equipment, materials, or services. OES may also offer a set off of fees for owners or transporters of hazardous materials that contract with OES to provide equipment, materials, supplies, or services in responding to a hazardous material release. GC Section 8670.40, which imposes the statewide oil spill prevention fee, is amended to entitle an owner of crude oil or petroleum products that are transported by rail to offset their oil spill prevention fees with the fees paid for the surface transportation hazardous material fee proposed by this bill.

Fee collector reimbursement. OES may authorize the railroad or truck owner to collect a reasonable amount to cover the processing and payment of fees from the owner of the hazardous materials being transported.

Fee exemption. OES may exempt from the fee certain shipments of hazardous materials as follows:

- Those shipments of hazardous materials that do not merit inclusion in the state regional railroad and surface transportation accident preparedness and immediate response plan, as specified, and;
- Those shipments of hazardous materials that do not merit additional governmental preparation to respond to their release in the event of a railroad or surface transportation accident.

The fee shall not be imposed on the hazardous materials owner, the railroad, or the truck owner that has paid the fee as required by this bill for further transporting the same hazardous materials in the same rail cars on a different railroad within the state.

This bill is effective January 1, 2016, but the surface transportation hazardous material fee is operative within six months after establishment of the schedules of fees.

Background: In 1991, Senate Bill 48 (Thompson) required the BOE to implement the collection of the Hazardous Spill Prevention Fee to be paid by each surface transporter of hazardous materials on California highways and railroad lines, which was administered in cooperation with the Department of Toxic Substances Control (DTSC).

The fees were deposited into the Rail Accident Prevention and Response Fund, which that bill created, to provide funding for cleanup costs related to hazardous spills and to finance the Railroad Accident Prevention and Immediate Deployment Force operated by DTSC. The Hazardous Spill Prevention Fee expired on December 31, 1995.

In 2002, Assembly Bill 2479 (Jackson) would have required the BOE to implement the collection of a fee to be paid by each surface transporter of a substance of concern in accordance with regulations adopted by the DTSC. That bill failed to pass out of the Assembly Appropriations Committee.

In 2006, Assembly Bill 2822 (Mullin) would have required the BOE to implement the collection of a fee imposed upon each railroad corporation that transports a hazardous material in the state. That bill failed in the Assembly Transportation Committee.

In 2014, SB 1319 (Hill, et. al, as amended 08/22/14), would have imposed a Regional Railroad Accident Preparedness and Immediate Response Fee. The unspecified fee would have been imposed on hazardous material owners at the time the hazardous material is transported by loaded rail tank car. A similar bill, SB 506 (Hill and Pavley, as amended 06/15/14), would have imposed an unspecified fee on the hazardous material owners at the time the hazardous material is transported by loaded railroad tank car. SB 1319 was completely rewritten, while SB 506 failed in the Assembly.

Last year the Legislature enacted SB 861, which generally expands the oil spill prevention and administration fee (prevention fee) and the oil spill response fee to include inland waters of the state. SB 861 effectively expanded the prevention fee to apply to crude oil rail shipments that were entering California from other states and countries. The prevention fee was expanded to include crude oil and petroleum products received at a refinery in this state by any mode of delivery that passed over, across, under, or through waters of the state. Crude oil or petroleum products are rebuttably presumed to meet this criteria. The bill was effective June 20, 2014, but provided a 90-day delayed operative date for the prevention fee, which was operative on September 18, 2014. As explained below, crude oil rail shipments became a growing concern at the national and state levels of government.

In General: In general, federal laws regarding railroads cover safety, hazardous material transportation, hazardous material emergencies, inspections, and security. Federal laws generally preempt most state regulations. The US DOT is the main federal agency responsible for federal rules and enforcement, more specifically, the Federal Railroad Administration (FRA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA). The PHMSA is specifically responsible for the protection of people and the environment from the risks of hazardous material transportation. With respect to the transportation of hazardous material, federal laws generally preempt state laws and regulations. However, federal statutes provides that a State may impose a fee related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. In capability for emergency response.

In California, the state OES assists local governments in emergency preparedness, response, recovery, and hazard mitigation efforts. The CPUC shares authority with the federal government to enforce federal safety requirements and state safety rules. The CPUC is responsible for regulating railroad safety where federal regulations do not preempt state authority. The Federal Railroad Safety Act of 1970 (FRSA) and the Rail Safety Improvement Act (RSIA) of 2008, generally preempt state laws and regulations that have the purpose or effect of regulating rail transportation and safety that are covered by federal laws and regulations.

At both the federal and the state level of governments, as well as national industry associations, the recent increase in oil transportation by rail has been investigated, reported, analyzed, and debated. Although information is available regarding reported and estimated amounts of oil shipments by rail, it is not comprehensive information collected on all types of hazardous material shipped by rail. According to some reports, the difficulty with regulating hazardous material is that although the DOT requires shippers and carriers to identify hazardous material and keep records, this information is

⁹ Section 20106 of Subchapter I of Chapter 201 of Part A of Subtitle V, of Title 49 of the US Code, relates to preemption of federal laws and regulations related to railroad safety and security.

⁸ A budget trailer bill, SB 861 (Ch. 35, Stats. 2014).

¹⁰ Subdivision (f) of Section 5125 of Chapter 51 of Subtitle III of Title 49 of the US Code, specifies the hazardous materials transportation fee and reporting requirements by the State. Section 5125 is related to preemption of federal laws and regulations related to hazardous materials transportation.

considered proprietary and not accessible to the public. Consequently, it is currently difficult to obtain or estimate the amount or frequency of hazardous material transported by rail.¹¹

Commentary:

- 1. The fee is imposed on the hazardous material owner, but the railroad or truck owner would be responsible for fee collection. The fee schedule will be set by OES, which may include separate fee schedules for hazardous material transported by either railroad or truck. Within six months of that rate setting, the BOE would begin fee collection. In order to gain efficiencies and streamline administration, the railroads and truck owners would collect the fee from the owner of the hazardous material. As the return and fees are due quarterly, it is expected that the railroads and truck owners would use their shipping information to bill the hazardous materials owners for transporting hazardous materials.
- **2. Truck owner registration with the BOE should be added.** The bill currently requires only railroad operators, and not truck owners, to register with the BOE.¹³ As written, returns are filed with, and fees remitted to, the BOE "by the person required to register with the board."¹⁴ While the hazardous material owner is liable for the fee, payment to a railroad or truck owner "registered" with the BOE is sufficient to relieve the hazardous material owner of further liability.¹⁵
- 3. BOE would handle appeals and refunds, except those related to qualifying "hazardous material." This bill defines "hazardous material" and places responsibility with OES for deciding any appeal or claim for refund based on the grounds that the rail car or truck content is not a hazardous material.
- **4. "Owner" of hazardous material.** By definition, "owner" means the person who has the ultimate control over, and the right to sell, the hazardous material being shipped. To assist the BOE, railroads, and truck owners, the shipper, consignor, or consignee of the hazardous material is rebuttably presumed to be the owner of the hazardous material.

The presumption may be overcome by showing that the ownership of the hazardous material rests with someone other than the shipper, consignor, or consignee. Evidence to rebut the presumption may include, but is not limited to, a bill of lading, shipping document, bill of sale, or other medium that shows the ownership of the hazardous material rests in a person other than the shipper, consignor, or consignee. The BOE would decide any issues regarding the rebuttable presumption of hazardous material ownership.

BOE staff have concerns that the term "owner," may not capture business entities that contract with the railroads. The term may need to be expanded to also capture persons, who may not be the shipper, consignor, or consignee, but acts in place of the shipper or owner of the hazardous materials. The term "owner" may need to be defined in such a way as to capture the customer of the railroad to ease their fee collection administration.

5. Fee payment through a "contribution in kind" or "set off" would be unique. The BOE administers numerous programs with tax credits, exemptions, exclusions, refunds, and appropriations. The contribution in kind and set off options provided in this bill are new to the BOE. BOE staff is unaware of any other California statute or regulation, other state statute, or federal or local

¹¹ <u>US Rail Transportation of Crude Oil, Background and Issues for Congress</u>, California <u>Emergency Response to Rail Accidents</u>, <u>Regulatory Framework</u>, <u>Moving Crude Oil by Rail, Association of American Railroads</u>, <u>Oil by Rail Safety in California</u>, State of California, Interagency Rail Safety Working Group.

¹² BOE staff would prefer the fee to be due "on the first day of the first calendar quarter commencing AFTER six months of establishing the fee."

¹³ Proposed GC Section 8574.34.

¹⁴ Proposed GC Section 8574.38.

¹⁵ Proposed GC Section 8574.32(b)(4).

government program that provides a similar payment structure. Concerns regarding contribution in kind payments, include, but are not limited to:

- (1) Could a contribution in kind payment be applied as a "credit" to other tax or fee programs?
- (2) Is the feepayer entitled to a refund of the "credit?"
- (3) Is the contribution in kind essentially a state purchase of the equipment, materials, or services, since this is only offered to owners or transporters of hazardous materials that contract with OES?
- (4) Could the contribution in kind be a violation of California Constitution, Article 16, Section 6, which prohibits the giving or lending of the credit of the state?

The unique payment options are available to those hazardous materials owners or transporters that contract with OES for equipment, materials, supplies, or services to respond to hazardous material releases. How would the hazardous material transporters report that surface transportation hazardous material fee credit to the BOE? Would a transporter that does not have a surface transportation hazardous materials fee obligation be entitled to a refund? This option would require transporters, rail lines and truck owners to register with the BOE as they are responsible for collection of the fee from the hazardous material owners. In order to provide a contribution-in-kind option the BOE presumably would need to register an unknown number of hazardous material owners. This would result in additional programming and administrative costs to the BOE. It is assumed OES would pre-approve the market value of the equipment, materials, supplies, or services, notify the BOE of such amount, provide the identifying information for the hazardous material owner or transporter who contracts with OES, and then report this amount to the BOE.

Finally, the set off provision entitles owners of crude oil or petroleum product that are transported by rail to offset their oil spill prevention fees with the proposed surface transportation hazardous material fees. This provision would seem to only benefit the oil industry, since only they pay the oil spill prevention fee. Other feepayers may argue that they should receive an offset against some other tax or fee program. Moreover, the oil spill fee is a per-barrel fee paid on a monthly basis, collected by marine terminals and refineries. The proposed surface transportation hazardous material fee would be imposed quarterly on a rail car or truckload basis and collected by either the railroad or truck owner. The refinery or marine terminal operator presumably would need to know, in advance the credit amount to offset against the owner of the crude oil or petroleum product. Otherwise, the refinery or marine terminal operator would be required to collect the oil spill fee. Would the OES or BOE disclose this credit offset amount to the refinery or marine terminal operator?

6. Fee collector reimbursement provision. OES may authorize the railroad or truck owner to collect a "reasonable amount to cover the processing and payment of fees made pursuant to this article from the owner of hazardous materials being transported." This language suggests the railroad or truck owner could collect a reasonable surcharge from the hazardous material owner, which may lead to varying reimbursement amounts. In the event the owner underpaid, would the state receive payment of the hazardous material fee before the feepayer could retain their processing costs? BOE staff suggests OES set the reimbursement rate and address administrative issues in statute or regulation. Additionally, GC Section 8574.32(b)(1)(A) appears to only apply to the loaded rail car or truck that enters California from outside the state.

Other fee programs administered by the BOE allow a retailer to retain a specified amount or percentage of the collected fees as reimbursement for their administrative costs. BOE staff can assist the authors with conforming fee collector reimbursement language.

7. The bill provides an exemption for a railroad shortline. The hazardous materials owner would not be assessed a second fee for transporting the same hazardous material in the same rail cars on a

different railroad within the state. The exemption would apply when a Class III railroad, or shortline, handled the same loaded rail cars from a Class I railroad. Are there situations in which trucks need a similar exemption for hauling the same hazardous material that was assessed a surface transportation hazardous material fee already collected by a railroad or truck owner?

8. Administrative start-up cost funding is essential. This bill is effective January 1, 2016, and requires the Director to establish new fee schedules. Within six months of the established fee schedules, the BOE must begin to collect the fee. Fee implementation would likely begin in the middle of fiscal year 2015-16, with fee collection following soon after. Upfront BOE implementation cost reimbursement is essential. The bill should provide either a direct appropriation to the BOE for fiscal year 2015-16 administrative costs or a loan from the General Fund (GF) to the Fund. The loan would be repaid from collected fees.

Constitutional and statutory provisions prohibit the BOE from using special fund appropriations to administer the proposed fee program. Without an appropriation, it may be necessary for the BOE to divert GF dollars to implement the new program. A GF diversion typically results in a negative impact on GF-supported programs and related State and local government revenues.

9. Technical amendments. BOE staff suggests the term "loaded hazardous material rail car or truck" be defined. It is unclear if there is a de minimis amount allowed, or if the fee is imposed on any amount of hazardous material loaded onto a rail car or truck.

Subdivision (c) of Section 8574.32 provides an exemption for "those shipments of hazardous materials" under specified conditions. This provision is permissive and allows OES to exempt certain shipments, as opposed to hazardous materials. The exemption, if by shipments, should be detailed in statute or regulation in order to provide sufficient administrative guidance to the transporters, hazardous materials owners, and the BOE.

The prescriptive offset provision provided in GC Section 8670.40, related to the oil spill prevention fee, should be consistent with the permissive language provided in the proposed GC Section 8574.32(f) for the surface transportation hazardous material fee. The contribution in kind or "set off" is only allowed if authorized by OES, and only if the owner or transporter of hazardous material contracts with OES, as specified. Conversely, the oil spill prevention fee amendment provides that an owner of crude oil or petroleum products is "entitled" to "offset" the surface transportation hazardous materials fee against the oil spill prevention fee. In general, the language in both sections needs to harmonize and be made clearer.

Administrative Costs: The BOE would incur substantial costs to develop a new fee program. These costs would include developing computer programs, developing forms and publications, creating registration for railroads, truck owners, and possibly an unknown number of hazardous material owners, mailing and processing billings, carrying out compliance and audit efforts, developing regulations, training staff, and answering fee-related inquiries. In addition, BOE staff would need to address accounting, programming, legal, policy, and administrative issues with the payment of fees through contribution in kind or set off provisions. The offset provisions with the oil spill prevention fee program may require changes to that fee programs return and require additional outreach. A cost estimate is pending.

Revenue Impact: Because the bill does not specify a fee amount, no revenue can be estimated.